U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: SEP 19 2006

EAC 04 244 53292

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Marie Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a management analyst in the field of business optimization. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now Citizenship and Immigration Services (CIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We note that 8 C.F.R. § 204.5(k)(4)(ii) requires waiver applicants to submit Form ETA-750B, Statement of Qualifications of Alien, in duplicate. The record does not contain this form, and therefore the petitioner has not properly applied for the national interest waiver. The director, however, did not note this discrepancy in the request for evidence or in the subsequent denial notice. We will, therefore, review the matter on the merits.

In a letter accompanying the initial filing, counsel states:

> [The petitioner] is a prominent researcher in Operations Research and Business Engineering and Optimization. . . . In China, based on his two major award-winning optimization models in 1986 and 1990, his pioneering approach in design, development and implementation of Shanghai . . . Gas Pipeline Optimization in 1992 was exemplary, and received considerable nationwide attention. In Canada . . . , [the petitioner] made contributions of two major governmental projects: Fair-Market Property Value Re-Assessment and Children Service Data Warehouse Initiative. . . . He is assisting many American firms that are conducting business globally to increase their competitive edge in the global market. And his contribution in facilitating US-China economic co-operation is well recognized. He is also utilizing Operations Research methods to optimize business process, analyze financial risk for mortgage banking. His work directly links to the cost saving and increasing revenue for American lending institutes through business process reengineering, which benefits not only institutional lenders, but **millions of mortgage debtors and help America build a fair and solid financial industry as a whole**. Due to his exceptional talent and dedication, [the petitioner] has substantially outperformed his peers.

(Counsel's emphasis.) Counsel states that the petitioner merits a waiver because the labor certification process fails to take into account "individual talents and ability. For instance, a labor certification filed on behalf of Dr. **Albert Einstein** for the position of professor **might have been defeated** so long as an ordinary professor **had been available**."[1]

The petitioner's initial submission includes numerous witness letters, some examples of which we shall discuss here. Tony Cai, an associate professor at the University of Pennsylvania's Wharton School, offers an overview of the petitioner's past work:

> What distinguishes [the petitioner] from his peers is his ability in bridging the theoretic and practical worlds together. He has deep understanding of the statistics theory and its profound business application in the financial analysis.
>
> Long before coming to Wharton School for his MBA degree, with a Master's degree in Operations Research, [the petitioner] had started his business-consulting career using Operations Research techniques in China. His work for WenZhou Fish Machinery business planning project and Shanghai gas pipeline deployment project was highly recognized and appraised. His extensive consulting engagements and excellent research work on multi-criteria decision making in China have established him as an outstanding expert in business optimization utilizing Operations Research. . . .
>
> [The petitioner] has made great contribution to the Canadian economy during his stay in Canada. His creative implementation of Operation Research methodology in strategic business planning engagement for a major Canadian high tech company achieved remarkable business returns for the company. His expertise on optimization and Operations Research was utilized to re-align distribution channels for a large Canadian soft drink company. The realignment realized more than 20 million dollars in instant cost savings for the company. His work for Ontario property reassessment was phenomenal. Based on multi-criteria decision-making model, his approach optimized the balance of revenue generation and the financial impacts of reassessment for different property groups. It created great incentives for business owners without sacrificing fairness. It thus made a great contribution to Ontario economical growth and prosperity. This letter of recommendation would be incomplete if I did not mention his work for Ontario Children Service data warehouse project. His contribution to the project significantly reduced development cycle, provided tremendous cost saving for operating such a complicated system. His work was first-class and was highly appraised. . . .

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[1] This analogy fails to take into account that there exist other immigrant classifications for aliens with major national or international reputations. Using counsel's example, Albert Einstein was already a Nobel laureate (and, arguably, a household name) when he arrived in the United States, and he easily would have qualified as an alien of extraordinary ability under section 203(b)(1)(A) of the Act, or as an outstanding researcher under section 203(b)(1)(B) of the Act, had those classifications existed at the time.

> About three years ago, [the petitioner] returned to US and his contribution of our contribution of our economy has been remarkable. In Danzas AEI, utilizing Operations Research methodology and Business Intelligence techniques, he optimized business process of global end-to-end logistics management system. It significantly reduced the overall cost of operating a global logistics business. It enabled the US logistics business to be more competitive in the global marketplace. In Framework, Inc., a wholly owned subsidiary of Bank of America, his financial model integrates multi-criteria decision-making technology and financial engineering methods to deliver more efficient lending service to millions of American homeowners.

Joseph P. Pennachetti introduces himself as the "Chief Financial Officer and Treasurer for the City of Toronto, Canada and as the former Commissioner of Finance and Treasurer for the Regional Municipality of Peel in the Greater Toronto Area." He offers further details regarding the petitioner's work in Canada:

> The property fair market value assessment reform was a tremendous undertaking of the Ontario government, which impacts more than 4.1 million properties in the province. With his financial analysis expertise, [the petitioner] incorporated Operations Research methods in analyzing extremely complex property tax reform issues. His analysis provided the tools to develop and implement options for decision making at the Peel Council and was also utilized by many Greater Toronto Area municipalities.
>
> The Ontario Childcare Data Warehouse Project . . . was developed to provide more efficient delivery of children services in Ontario. His combined skills in business process re-engineering and Operations Research resulted in another business model for the Peel initiative which was then utilized in an Ontario-wide model. The improved operational efficiency from his model provided the right information to deliver more cost-effective children services in Ontario.

Other witnesses who have business or academic ties to the petitioner offer similar assessments of the petitioner and his work, stating that the petitioner is a highly trained professional who has brought impressive results to the projects he has undertaken. The witnesses offer relatively few comments regarding the petitioner's current work in the United States. Jim Bradford, Manager, Professional Services at DHL Danzas Air & Ocean, states: "Working at a subsidiary of Bank of America, [the petitioner] is developing and implementing a financial and operating model, which utilizes statistics, financial analysis, financial forecasting and operations research techniques to help enhance efficiency and reduce cost for mortgage lending to millions of Americans." Mr. Bradford also refers to the petitioner's "recent efforts in establishing a consulting firm to implement his methodology."

The director issued a request for evidence on April 26, 2005, stating:

> It appears that the beneficiary has, since arrival in the United States in 2000, had three different positions as a management analyst, for three different employers. The results of

> these jobs, based on the evidence thus far presented, appear to have been primarily of benefit to the employers, as opposed to being national in scope. . . .
>
> You must provide additional evidence to specifically show that the beneficiary will have an impact that can be expected to far exceed that of other practitioners in his field of endeavor. Generalizations and unsupported opinions will not suffice in this regard.

In response, counsel asserts that the petitioner "has been actively engaged in activities which strengthen the economic and culture ties between US and China and directly or indirectly help US multinationals benefit from China's booming economy." A crucial question that counsel does not address is the question of degree. Certainly there is massive trade between China and the United States, and this trade is of considerable economic significance, but the petitioner has not established that he, individually, has had and will continue to have an impact on this trade that is so significant as to be discernible at the national level. To offer an analogy, health care is of clear importance, and every individual doctor and nurse is "actively engaged in activities" relating to health care, but it does not follow that every such worker qualifies for a waiver.

In an effort to establish the significance of what counsel calls the petitioner's "influence in fostering and facilitating US-China economic ties," the petitioner submits a letter from Professor Hu Yuda, president of the Decision Making Science Society of China (DMSSC). Prof. Hu states:

> As an active overseas member of the society, [the petitioner] has provided valuable inputs to our efforts in policy setting research and feasibility studies. . . .
>
> Over half of the SOE's [China's state-owned enterprises] are still losing money. . . . The government often orders state banks to give loans to these firms . . . [which] created mountains of no-performing loans. Moreover, SOE firms are also entangled in debts with each other, a phenomenon known as "Triangle Debts." To break the stalemate debt situation, DMSSC is contracted by government to provide feasibility study in reform of SOE's debt problem. [The petitioner] has designed a dynamic multiobjective optimization model to help break the dead-lock in the Triangle Debts. His model is widely adopted to analyze the Triangle Debts issues.
>
> Allowing Foreign Direct Investment (FDI) including funds from US businesses to participate in SOE's reform will help expedite China's transformation to a market economy, which will consequently bring great prosperity for both U.S. and China. However, to successfully undertake this daunting task, a balance between social stability and economical prosperity needs to be maintained during the reform process. Via DMSSC sponsored research forum, [the petitioner] has participated in the feasibility study and impact analysis for FDI involvement in SOE reform. . . . [The petitioner's] research will help policy makers to gain insights on possible impact of various approaches in this ground-breaking reform, which may fundamentally impact the economic cooperation between China and the United States. . . .

> His recent research to quantify the unique financial risk in Chinese equity market investment will help US companies and investors understand the unique China risk and provide means to control those risks. . . . Moreover, [the petitioner] is also actively involved in helping SOEs seeking US investment and corporations. He has helped arrange Chinese local government delegations in US exploration in planning for and managing global expansion.

The record does not show when the petitioner's work for DMSSC took place. The initial submission contained no mention of DMSSC at all. Therefore, we must conclude either that this work had not happened yet as of the petition's filing date, or that the petitioner and counsel chose not to mention this work in the initial filing. The latter possibility seems to be difficult to reconcile with counsel's subsequent claims regarding the importance of that work. Either way, the record contains no concrete evidence to establish the significance or extent of the petitioner's work with DMSSC.

Counsel asserts that the petitioner's "strong China influence can also be appreciated from the frequent citation of his published papers by Chinese scholars." The petitioner documents three citations of "The Subdifferential Stability of Disturbed Multiobjective Programming," published in a Chinese mathematical journal in 1992 when the petitioner was a graduate student in the Applied Mathematics Department of Shanghai JiaoTong University. If three citations over the course of twelve years constitute "frequent citation," it is not clear what counsel would consider to be "infrequent citation." The petitioner has not shown that his article, or any article that cites it, is about business or economics. The petitioner has submitted only the abstract of his article, and the highly technical language of that abstract does not mention business or economics. Thus, this article and its three citations are poor evidence of the petitioner's "strong China influence" in the field of business optimization.

Counsel states:

> While at one time, the beneficiary is gainfully employed by a specific employer; his contributions are not primarily limited to benefiting his employer. . . . [His] service as Architect to Engineous Software in the design and development of FOCUS will significantly benefit the American economy. . . . FOCUS's multi-model design and the seamless integration with *iSight* optimization engine (which have been adopted and deployed in over **200 of Fortune 500 American companies and international firms** including **Boeing**, **General Motors Corp.**, **GE** and **Sony Corporation**) are pioneering in providing close-to-real time multiple scenario analyses. . . . This is an accomplishment benefiting the whole American financial industry.

(Counsel's emphasis.) The record contains nothing from the above-named major corporations, attesting to the importance of the petitioner's work to their companies. A product or service is not necessarily a major advance simply because it is used by high-profile clients. Furthermore, the petitioner's initial submission contained no mention of Engeneous Software or FOCUS, and there is no evidence that the petitioner was working on this project at the time he filed the petition. Rather, at the time of filing, counsel stated that the petitioner's then-current work affected "American lending institutes" and "mortgage banking." Asked to list his recent employers on Form G-325, Biographic Information, days before he filed the petition, the petitioner

did not name Engeneous Software. The beneficiary of an immigrant visa petition must be eligible at the time of filing; his subsequent involvement in a particular project cannot retroactively establish eligibility as of the filing date. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971) and *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm. 1998).

As shown above, the petitioner's initial submission contained descriptions of various projects that the petitioner had undertaken in various countries. When the director requested additional evidence, the petitioner submitted evidence about completely different projects, never mentioned in the initial submission.

The director denied the petition on September 7, 2005, stating that the petitioner's waiver claim rests primarily on letters from "those who know the beneficiary through academic contact or business relationships," and that the petitioner has not shown the relevance his "academic abstract, written in China some 13 years prior to filing." The director found that the petitioner's evidence and letters do not address the guidelines set forth in *Matter of New York State Dept. of Transportation*. The director also noted, briefly, counsel's "attempts to characterize the beneficiary's potential to the late Albert Einstein."

On appeal, counsel quotes from the legislative history, indicating that Congress had economic benefit in mind when it created the national interest waiver. The director never disputed the general principle that an alien who benefits the United States economically may qualify for a waiver; but it does not follow that every such alien so qualifies. Counsel, on appeal, asserts that the petitioner "is an expert whose endeavor has benefited our economy," but counsel does not elaborate on this point or explain how the previous submissions should have established the point.

Counsel states that the director "has twisted our analysis of argument" regarding the reference to Albert Einstein, and states "it is confusing that [the director] holds it against our petition." The director did not state that the denial was based, to any degree, on the Einstein reference. The director merely acknowledged, in a single sentence, that counsel had made such a statement. The context of this acknowledgement was a summary of counsel's arguments. Removal of this one sentence would not substantively alter the decision or its outcome, and therefore we find no material error here.

Counsel contends that the director, by stating that the petitioner's witness letters are inadequate, "is asking for something unreasonable and is very biased against the beneficiary." Counsel asserts that the witnesses who provided the letters are "scholars and business leaders" who cannot be expected to be familiar with immigration law in general or *Matter of New York State Dept. of Transportation* in particular, and therefore should not be expected to tailor their letters to the requirements of case law. (Counsel does not specify what efforts were made to explain the basic requirements to the witnesses at the time they were approached for their letters.) It remains that the petitioner must establish that he meets certain guidelines. The petitioner's burden of proof does not shift or evaporate simply because his colleagues are unfamiliar with immigration law. More fundamentally, the issue is not that the witnesses' letters fail to fit a particular format. Rather, the director determined that the information that the letters *do* contain does not support a finding of eligibility.

Counsel acknowledges, but does not dispute, the director's observation that the petitioner's witnesses appear to have close ties to the petitioner. Counsel states, instead, that the director was not justified in inferring that

the petitioner's "impact is somewhat limited." Counsel then asserts that "a substantial number of organizations, universities, governmental agencies, and business establishments have been benefited by beneficiary's work." Counsel asserts that the petitioner's wide variety of clients "is an argument for, not against [approval of] his petition." The director did not contest the claim that the petitioner has served many public and private clients, but this is arguably the norm for consultants. The fact that the petitioner has held a series of short-term assignments rather than a smaller number of long-term jobs is neither beneficial nor detrimental to his claim. As for the importance of the petitioner's work during those short-term assignments, the record is devoid of documentary evidence to corroborate or clarify the often vague or speculative remarks offered by colleagues and former clients. The record does not support counsel's claim, on appeal, that the petitioner has "submitted substantial documents." Most of the documentary (as opposed to testimonial) evidence in the record relates to the petitioner's professional or academic credentials

Counsel's final argument on appeal is that the director "singled out one academic abstract . . . to question its linkage to our claim of beneficiary's contributions to US economy. As a matter of fact, this abstract was [submitted] to provide reference about the recent citations of his paper and the impact of beneficiary's research." The nature of this "impact" outside of the academic realm of advanced theoretical mathematics has never been made clear. It was counsel and the petitioner who first "singled out" the document.

We concur with the director that the petitioner has not established that the interests of the United States, and of prospective employers, would be better served by a national interest waiver than by the standard job offer/ labor certification process. With regard to labor certification, we note that, in July 2006, a U.S. employer (not any company identified in the petition) filed a new I-140 petition on the alien's behalf. That petition is currently pending. While the AAO is not in possession of the documents in this new petition, CIS records indicate that the petitioning company checked box "D" on part 2 of the Form I-140, indicating that the company did not seek a national interest waiver for the alien. This suggests that the new petition was filed with an approved labor certification. Given this information, the waiver claim appears to be largely moot; in the present proceeding, the petitioner seeks to waive a requirement that has evidently been met. Even if this were not the case, however, the petitioner has not set forth a persuasive claim.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. This denial is without prejudice to any subsequent petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.